

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2¹**

TOURO COLLEGE JACOB D. FUCHSBERG)
LAW CENTER,)
)
Employer,)
)
and)
)
CONSOLIDATED COMMERCIAL WORKERS)
OF AMERICA, LOCAL 528,)
)
Petitioner.)

Case No. 29-RC-230262

**EMPLOYER’S REQUEST FOR REVIEW OF DECISION ON OBJECTIONS AND
CERTIFICATION OF REPRESENTATIVE**

Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Touro College Jacob D. Fuchsberg Law Center (“TLC”), hereby files the within Request for Review of the Decision on Objections and Certification of Representative issued by John J. Walsh, Jr., Regional Director for Region 2 (the “Decision”). As set forth herein, review of the Decision is warranted because the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and this error prejudicially affects TLC, and because the facts and circumstances of this matter present compelling reasons for reconsideration of an important Board rule or policy.

¹ This matter was initially commenced in Region 29. However, as discussed below, the underlying Decision on Objections and Certification of Representative which is the subject of the within Request for Review was rendered by the Regional Director for Region 2, after the matter was transferred to his jurisdiction.

STATEMENT OF FACTS

This election involved a total of nine eligible voters in TLC's maintenance department. The election was held in person on November 19, 2018 (the "Election Date") between 2:00 p.m. and 4:00 p.m. Eight of the nine eligible voters in the petitioned for bargaining unit were present at work on the Election Date. The election was held within the maintenance department, at a table customarily used by the employees as their break area (the "Voting Area"). The time clock for the maintenance department is in the vicinity of the Voting Area.

At approximately 3:00 p.m. on the Election Date, eligible voter Glenn Geier came into work for the evening shift. When Mr. Geier arrived at work, he observed a woman whom he did not know sitting at the Voting Area, along with the two TLC employees Jose Rodriguez and Phillip van Gostein. On information and belief, the woman seated at the table was the Board Agent, Annie Hsu. Moreover, Mr. Rodriguez was serving as Petitioner's election observer and Mr. van Gostein was serving as TLC's election observer.

When Mr. Geier approached the Voting Area, the Board Agent asked if he was there to vote. Mr. Geier, who was unaware of the election, told the Board Agent "no, I am not here to vote, I am here to punch in and go to work." The Board Agent instructed Mr. Geier that he must vacate the Voting Area. The Board Agent did not affirmatively inform Mr. Geier of his right to vote.

Mr. Geir then left the maintenance department and began to perform his duties for the day. While he was performing his duties, Mr. Geier learned that there was a union election occurring in the maintenance department. When Mr. Geier later returned to the maintenance department during his shift, at approximately 3:30 p.m., the Board Agent stared at him with a cold gaze, which intimidated Mr. Geier from returning to the Voting Area. Thus, due to the

Board Agent's actions, Mr. Geier did not feel comfortable remaining in the maintenance department or approaching the Voting Area. Mr. Geier was therefore deterred from exercising his right to vote in the election, and he ultimately did not vote.

Additionally, while the election was ongoing, the Board Agent affirmatively informed Mr. Rodriguez of his right to vote in the election and invited him to do so. The Board Agent did so despite knowing that Mr. Rodriguez was serving as the Petitioner's observer and, therefore, should have been aware of his right to vote.

When the final ballots were tallied by the Board Agent, only seven of the eight employees who were present on the Election Date voted. Of those seven, four voted for the Petitioner and three voted against.

PROCEDURAL HISTORY

TLC timely filed its Objections to the Conduct of Election and Conduct Affecting the Results of the Election (the "Objections"), along with the required Offer of Proof setting forth the aforementioned facts, on November 26, 2018. Petitioner filed a self-styled Statement of Position in Response to Employer's Objection to Election on November 30, 2018. That same day, an attorney from Region 29 informed the parties that, due to the nature of the allegations in the Objections, the matter was being transferred to Region 2.

Almost one month later, on December 26, 2018, a field attorney from Region 2 contacted the parties (and the Board Agent) by e-mail, advising them: "I am assigned to investigate the [O]bjections filed in the above-referenced case. I will be in contact with you today. Thank you." However, this field attorney did not contact TLC that day. Accordingly, the next day, December 27, 2018, counsel for TLC responded to ask when the field attorney would contact her. In response, the field attorney called counsel for TLC and informed her that, notwithstanding the

field attorney's representation that she had been assigned to conduct an investigation, she had already made a recommendation to the Regional Director that the Objections should be dismissed without an investigation. Later that day, the field attorney also clarified in an email, "for the record," that she "did not talk to anyone in the case except just now," with counsel for TLC. Thus, no investigation into the Board Agent's underlying conduct actually occurred prior to the field attorney's recommendation, and the Region made no efforts to gather evidence to refute (or corroborate) TLC's Offer of Proof prior to denying the Objections.

Almost two weeks later, on January 10, 2019, the field attorney for Region 2 contacted counsel for TLC to advise that the Regional Director had decided to dismiss the Objections and certify the results of the election. She further advised TLC that it could withdraw the Objections, or that a decision would be issued towards the end of the following week. Almost two weeks later, on January 23, 2019, the Regional Director finally issued the Decision denying the Objections and certifying the election.

In the Decision, the Regional Director wholly discounted what he termed the "subjective" feeling of Mr. Geier with respect to the conduct of the assigned Board Agent, and held that "a reasonable employee would not have been intimidated by the circumstances described in the Employer's offer of proof and would not have been deterred from voting." *See* Decision at 5. The Regional Director also held that the Board Agent's conduct in inviting the Petitioner's observer to vote, while simultaneously chilling Mr. Geier's exercise of that same right, was not improper, as both forms of conduct were "assertions made to ascertain whether the eligible voter would be voting." *Id.* Having dismissed the Objections, the Regional Director certified Petitioner as the exclusive representative of the employees in the petitioned-for unit.

TLC timely files the within Request for Review and urges the Board to thoroughly review the underlying facts and circumstances of this matter, reverse the Decision and require the Regional Director to hold a hearing on the justified Objections.

ARGUMENT

Pursuant to section 102.67(d) of the Board's Rules and Regulations, the Board will grant a request for review "only where compelling reasons exist therefore." Those reasons include, as set forth in section 102.67(d)(2), "[t]hat the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party." Additionally, pursuant to section 102.67(d)(4), review may be granted where "there are compelling reasons for reconsideration of an important Board rule or policy." Here, it is respectfully submitted that both of the aforementioned circumstances are implicated by the Decision, and that the Board should therefore review same.

POINT I

THE REGIONAL DIRECTOR'S DECISION THAT THE BOARD AGENT'S CONDUCT IN THIS MATTER DID NOT AFFECT THE RELEVANT EMPLOYEE'S DECISION OF WHETHER OR NOT TO VOTE IS CLEARLY ERRONEOUS ON THE RECORD AND PREJUDICIAL TO TLC

In the Decision, the Regional Director stated, with seeming certainty, that Mr. Geier's "decision not to vote in the election or to even attempt to vote cannot be attributed to anything the Board Agent did or did not do." *See* Decision at 4. The Regional Director, of course, can cite to no evidence in the record supporting this blanket assertion, since the Decision deprived TLC of an opportunity to present testimony on this point at a hearing. Indeed, other than TLC's Offer of Proof, the Regional Director has no knowledge of what the Board Agent "did or did not do," let alone anything to support his speculative conclusions regarding her motives. Accordingly, the Decision is clearly "erroneous on the record" with respect to an essential fact, and the Regional

Director's decision to deny TLC a hearing on the Objections because of this erroneous determination is highly prejudicial, such that review of the Decision is warranted.

The Regional Director's findings regarding the impact of the Board Agent's conduct in this matter are plainly based solely upon his own speculation rather than any facts in the record. As noted above, there is nothing to contradict TLC's Offer of Proof that Mr. Geier was deterred from voting in the election by the Board Agent's conduct, so any finding to the contrary cannot be based upon any evidence in the record. Notably, this is not the sole finding based on sheer speculation contained in the Decision. For instance, in absolving the Board Agent of any wrongdoing, the Regional Director asserts that "the Board Agent had no way of knowing that the employee was an eligible voter who wished to exercise his right to vote." *See* Decision at 4. Of course, there is no testimony or other evidence from the Board Agent herself in the record to even support this assertion. Thus, rather than taking testimony at a hearing, the Regional Director has instead engaged in the same type of "wildly speculative" (to borrow his verbiage, *see* Decision at 4) conduct which he attributes to TLC by constructing his own narrative version of the underlying events and using this concocted story as his basis for denying the Objections.

Notably, the record also conclusively establishes that the Regional Director made no effort to even investigate the Board Agent's underlying conduct and whether it affected Mr. Geier's decision to vote in the election. Indeed, the assigned investigator for Region 2 explicitly conceded to TLC's counsel that she had spoken to no witnesses, or indeed anyone else, prior to making the recommendation to the Regional Director to deny the Objections. Thus, there is absolutely nothing in the record to refute TLC's Offer of Proof, or to support the Regional Director's speculative account of the Board Agent's purported personal knowledge and conduct. Thus, the Regional Director's determination that Mr. Geier's decision was not the result of the

Board Agent's conduct is "clearly erroneous on the record," and indeed without any support in the record whatsoever.

That the Regional Director's manufacturing of his own version of events is prejudicial to TLC is self-evident. TLC's objections are based largely on the fact that the Board Agent's conduct deterred Mr. Geier from voting in the election. TLC submitted the required Offer of Proof, believing that it would have the opportunity to offer the necessary testimony to support its position (to say nothing of Mr. Geier's right to vote on his bargaining representative). No factual evidence was presented or collected to refute TLC's Offer of Proof. But rather than offer TLC the opportunity to present its evidence at a hearing, the Regional Director instead invented his own version of events and denied the Objections because they did not fit his preferred narrative. Inasmuch as TLC was denied the opportunity to present this testimony at a hearing due to the Regional Director's conclusory and unsupported factual determinations, review should be granted.

It should be noted that the Regional Director's legal rationale for effectively condoning the Board Agent's conduct in this matter is particularly inappropriate. The Regional Director cited to *Magnum Transportation, Inc.* 360 N.L.R.B. 1093, 1096 (2014) for the proposition that the Board should "avoid unrealistic standards" of conduct for Board Agents because "[o]therwise, in any hard-fought campaign *involving a large number of voters*, it would be impossible to conduct an election which could not be invalidated by a party disappointed in the election results." *Id.* (emphasis added). This is simply *not* a matter involving "a large number of voters," but rather a narrowly tailored objection relating to the conduct of the Board Agent with respect to one of only nine eligible voters.

The Regional Director's reliance on *Magnum Transportation* is also ironic because a hearing *was* held on the employer's objections in that case. In fact, a hearing resulted in *Magnum Transportation* due to an issue with a single ballot, which was sufficient to affect the result. And, it should be noted, the Board Agent's conduct in *Magnum Transportation* was an effort to ensure that the employee was afforded the opportunity to have his vote counted – specifically, the Board Agent allowed the employee to cast a second ballot after his first was marked incorrectly due to the Board Agent's instructions. That the Regional Director would cite to a case where a hearing was granted due to an issue with one single ballot as *support* for his Decision to deny a hearing under similar circumstances, further amplifies the error. That is particularly true where, in this case, the Board Agent's conduct actually prevented the employee from voting.

Inasmuch as the Regional Director's finding that the Board Agent's conduct had no effect on Mr. Geier's "decision" not to vote in the election has no support whatsoever in the record, to say nothing of his own speculation regarding the Board Agent's motives and intent, it is clearly erroneous. Given that the practical effect of this clearly erroneous Decision is to deny TLC a hearing on the Objections, it is prejudicial. Accordingly, the Decision should be reviewed and, upon review, a hearing on the Objections should be held forthwith.

POINT II

THE FACTS AND CIRCUMSTANCES OF THIS MATTER WARRANT RECONSIDERATION OF THE BOARD'S POLICY OF DISREGARDING POST-ELECTION STATEMENTS BY NON-VOTERS

Assuming, *arguendo*, that the Board declines to grant review based upon the Regional Director's clearly erroneous finding that the Board Agent's conduct did not deter Mr. Geier from voting, then the Board still should grant review for a broader purpose. Specifically, this matter provides an excellent opportunity for the Board to reconsider the application of its standard policy of not considering after-the-fact statements of eligible voters in determining whether to

grant objections to an election. As evidenced by the underlying facts and circumstances of this matter, such a blanket policy is simply not warranted, and should be reconsidered in light of the Board's new election rules to allow for consideration of after-the-fact statements when made by a sufficient number of eligible voters to effect the outcome of an election.

As the Regional Director noted, the Board presently applies an effectively blanket policy of disregarding "after-the-fact statements obtained from eligible voters as to the reasons why they did not vote in an election." Yet it is respectfully submitted that this blanket policy existed primarily to ensure that after-the-fact statements could not be used to disenfranchise employees, whether in terms of ensuring that a valid final vote on an election is honored or that the employees are able to exercise their right to vote in the first instance. However, by denying TLC a hearing, and instead holding (without evidentiary support) that a "reasonable employee" would not have been intimidated by the Board Agent's conduct in this matter, the Regional Director turned this policy on its head in order to confirm the results of a disputed election which may have had a different outcome had Mr. Geier not been disenfranchised. These circumstances clearly demonstrate the inadequacy of the current policy and the need to revise same.

Each of the decisions cited by the Regional Director for this Board policy support that it should be applied in order to ensure that all eligible employees are able to vote, rather than to sustain the result of a tainted election. For instance, in *Pea Ridge*, the Board ordered a new election because it found that under the circumstances, "*where the election was decided by one vote*," a new election was warranted. *Pea Ridge Iron Ore Co., Inc. & Unification Org. Committee*, 335 N.L.R.B. 161, 161 (2001) (emphasis added). The circumstances at issue involved the Regional Director relying on a single employee's statement that he simply "decided not to vote" to deny a new election, based on the rationale that the employee's own subjective

statement confirms that he was not prejudiced by the late opening of the polls. However, the Board reversed, holding that the employee's statement "does not constitute evidence sufficient to establish that the employee could not possibly have been prevented from voting by the late opening of the polls." *Id.* Thus, based on the mere possibility that the employee had been disenfranchised by the election irregularity, a possibility which was seemingly contradicted by the employee's own statement, the Board still ordered a new election.

Similarly, in *G.H.R. Foundry*, the Board reviewed and reversed the Regional Director's decision denying objections and certifying an election based upon "the results of his investigation that only three employees were prevented from voting because of the late starting." *G.H.R. Foundry Div., Dayton Malleable Iron Co.*, 123 N.L.R.B. 1707, 1709 (1959). Once again, the Board applied its policy of not considering after-the-fact statements to set aside an election, in light of the fact that "the large number of nonvoters could have affected the results of the election." *Id.*

A similar rationale also prevailed in both *Whatcom* and *Nyack*, the other cases cited by the Regional Director. In *Whatcom*, the Board chastised the Regional Director's decision to contact some of the employees who were eligible to vote but declined to do so and, based on those discussions, "concluded that only two employees had been denied the opportunity to vote and therefore it was hypothetically impossible for the outcome of the election to have been affected." *Whatcom Sec. Agency, Inc.*, 258 N.L.R.B. 985, 985 (1981). As the Board recognized, "since the large number of nonvoters could have affected the election results," sustaining the objections and holding a new election was warranted. *Id.* In *Nyack*, the Board sustained objections and ordered a new election because "the votes of employees possibly disenfranchised by the late opening of the polls are sufficient in number to affect the outcome of the election."

The Nyack Hosp., 238 N.L.R.B. 257, 260 (1978). Again, the Board applied this rule to ensure that all employees were permitted their right to vote, notwithstanding after-the-fact statements that there had been an agreement to open the polls late, and the employer's contention "that employees who did not vote not prevented from voting by the late opening of the polls, and merely chose not to vote." *Id.* at 258.

In reviewing these cases, a common thread emerges. The Board maintains its standard of not considering after-the-fact statements, not to preserve the results of an election tainted by Board Agent misconduct, but rather to ensure that the rights of employees to vote in elections are not compromised by subjective statements from individual employees. That type of concern is simply not implicated here, where TLC's only goal is to ensure, as best as possible, that all employees are afforded the right to cast their vote regardless of their desired outcome.

Allowing the Decision to stand here will severely undermine the obvious intent of the Board's policy. Indeed, the Decision provides cover for subtle and different types of intimidation to permeate the elections process; actions which may not constitute party misconduct in and of themselves, but which clearly result in an employee being deterred from exercising their right to vote in an election. Conversely, a clear message from the Board that it will consider after-the-fact statements in considering objections in close elections will send a clear signal that the Board will take allegations of misconduct seriously, and will not disregard employees who do not feel comfortable speaking up about such misconduct until after the election has already occurred.

To be clear, TLC is not arguing that "subjective" statements of intent should *always* result in a hearing by default. Yet here, the fact remains that the election was decided by one vote, a non-voting employee is prepared to testify that his decision *not* to vote was influenced by the Board Agent's misconduct and (as noted above) there is no evidence in the record to refute

(or even cast doubt upon) this claim. Surely these circumstances warrant imposition of a new rule, *to wit*, that where the after-the-fact statements of one (or more) employees suggest that there was Board Agent misconduct sufficient to have affected the underlying result of the election, such statements may be considered in determining whether to grant a hearing on the employer's objections.


Finally, it should be noted that the policy the Regional Director relied upon in this matter was developed before the Board's 2015 changes to its election rules and procedures. Those amended procedures drastically affected the elections process, including by severely curtailing an employer's right to a hearing. Accordingly, by revising the current policy to allow for consideration of after-the-fact statements where the number of voters making such statements are sufficient to alter the result, the Board at least will ensure that the curtailing of an employer's right to a hearing on its objections does not also curtail the voting rights of eligible employees who were disenfranchised by Board Agent misconduct.

CONCLUSION

For the foregoing reasons, the Board should grant review of the Decision.

Dated: February 6, 2019
Jericho, New York

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